

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

United States of America,

Plaintiff,

vs.

Jared Lee Loughner,

Defendant.

CASE NO. 11cr0187 TUC LAB

**ORDER GRANTING MOTION TO
UNSEAL SEARCH WARRANT
MATERIALS [Doc. 131]**

INTRODUCTION

Two Arizona media outlets have petitioned the Court to release search warrant materials in this case. The materials consist of two search warrants, attached affidavits that recount basic facts about the suspected offenses and provide probable cause for the issuance of the warrants, and a property inventory of the things seized. The motion is opposed by the United States and by the Defendant. They argue the media outlets have no right to see the warrant materials at this stage in the proceedings, and that release of the materials will imperil the fair trial rights of the Defendant and violate the privacy interests of third parties. The Court has reviewed the warrant materials *in camera* and has considered the legal arguments, and finds the matter is ripe for decision.

BACKGROUND

On January 8, 2011, a mass shooting occurred in Tucson, Arizona during a political event at a shopping center. Nineteen people were wounded, six of them fatally. Among the victims were a United States Congresswoman, members of her staff, and a United States District Judge. Defendant Jared Loughner was arrested at the scene, and initially indicted

1 on three federal charges including attempted assassination of a member of Congress. That
2 charge gave federal prosecutors priority in pursuing a criminal prosecution. See 18 U.S.C.
3 § 351(f).

4 In the course of the criminal investigation following the shootings, law enforcement
5 agents obtained two search warrants from the Arizona Superior Court authorizing a search
6 of the Defendant's house and property. After the warrants were executed, the agents lodged
7 them with the state court, and the warrant materials were ordered sealed by a state court
8 judge on January 11, 2011.

9 On January 20, 2011, two Arizona media outlets, Phoenix Newspapers, Inc. and
10 KPNX Broadcasting Co., filed a motion in the Arizona Superior Court seeking the unsealing
11 and public release of the warrant materials. They relied chiefly on Arizona law, which
12 provides that search warrants shall generally be open to the public after they are served. See
13 Arizona Rev. Stat. § 13-398(A); *Phoenix Newspapers, Inc. v. Superior Court*, 180 Ariz. 159,
14 162, 882 P.2d 1285, 1288 (Ariz. Ct. App. 1994) (search warrants are subject to a
15 presumption of public access). They also asserted a qualified right under the First
16 Amendment to inspect the warrant materials. The United States Attorney, who by then had
17 obtained a federal indictment against the Defendant, removed to this Court the media
18 outlets' motion to unseal. The Court then permitted the media outlets to intervene in this
19 case for the limited purpose of pursuing the motion to unseal the search warrants.

20 The Court held an initial hearing on the motion to unseal on February 19, 2011. At the
21 hearing, the United States prosecutor represented that an active investigation of the Tucson
22 shootings was ongoing, and that she expected new, additional criminal charges would be
23 filed. Guided by *Times Mirror Co. v. United States*, 873 F.2d 1210 (9th Cir. 1989), the Court
24 denied the motion to unseal, ruling there was no First Amendment or common law right of
25 public or media access to the warrant materials at that time. The Court emphasized its ruling
26 was based on the current state of the case, and that it would reconsider the motion to unseal
27 at the next hearing on March 9, 2011. By that date, it was expected the active criminal
28 investigation of the case would be concluded and final charges would be filed.

1 On March 3, 2011, the grand jury returned a superseding indictment charging the
2 Defendant with forty-nine federal offenses. The indictment included special findings that, if
3 found to be true, could support imposition of the death penalty. The United States prosecutor
4 represents that the government's active investigation of the case has now concluded, and
5 that no additional federal charges are expected.

6 DISCUSSION

7 In *Richmond Newspapers v. Virginia*, Chief Justice Burger observed:

8 When a shocking crime occurs, a community reaction of outrage and public
9 protest often follows. Thereafter, the open processes of justice serve an
10 important prophylactic purpose, providing for the outlet of community concern,
11 hostility, and emotion. Without an awareness that society's responses to
12 criminal conduct are underway, natural human reactions of outrage and
13 protest are frustrated and may manifest themselves in some form of vengeful
14 "self-help," as indeed they did regularly in the activities of vigilante
15 "committees" on our frontiers. The accusation and conviction or acquittal, as
16 much perhaps as the execution of punishment, operate to restore the
17 imbalance which was created by the offense or public charge, to reaffirm the
18 temporarily lost feeling of security and, perhaps, to satisfy that latent urge to
19 punish.

20 Civilized societies withdraw both from the victim and the vigilante the
21 enforcement of criminal laws, but they cannot erase from people's
22 consciousness the fundamental, natural yearning to see justice done – or even
23 the urge for retribution. The crucial prophylactic aspects of the administration
24 of justice cannot function in the dark; no community catharsis can occur if
25 justice is done in the corner or in any covert manner. It is not enough to say
26 that results alone will satiate the natural community desire for "satisfaction."
27 A result considered untoward may undermine public confidence, and where
28 the trial has been concealed from public view an unexpected outcome can
cause a reaction that the system at best has failed and at worst has been
corrupted. To work effectively, it is important that society's criminal process
satisfy the appearance of justice, and the appearance of justice can best be
provided by allowing people to observe it.

448 U.S. 555, 570-72 (1980) (citations, quotations and alterations omitted).

23 The concerns expressed by Chief Justice Burger in 1980 resonate even louder in
24 today's digital age. Courts today play a major role in defining rights and liberties and in
25 shaping public opinion. Because of this, access to court proceedings has grown increasingly
26 important and there has been a corresponding expansion of rights on the part of the general
27 public and the media under the First Amendment to attend almost all criminal proceedings.
28 These stages in the criminal process are now generally presumed to be open – meaning that

1 there must be overriding reasons to exclude the public and press from attending them: bail
2 and pretrial release proceedings, *Seattle Times Co. v. U.S. Dist. Court*, 845 F.2d 1513, 1517
3 (9th Cir. 1988); preliminary hearings, *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1
4 (1986) (“*Press-Enterprise II*”); pretrial suppression hearings, *United States v. Brooklier*, 685
5 F.2d 1162, 1171 (9th Cir. 1982); change of venue hearings, *In Re Charlotte Observer*, 882
6 F.2d 850, 852 (4th Cir. 1989); change of plea hearings, *In Re Washington Post Co.*, 807 F.2d
7 383, 389 (4th Cir. 1986); voir dire, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510-
8 11 (1984) (“*Press-Enterprise I*”); criminal trials generally, *Globe Newspaper Co. v. Superior*
9 *Court*, 457 U.S. 596, 605-06 (1982); and sentencings, *United States v. Alcantyara*, 396 F.3d
10 189, 197-98 (2nd Cir. 2005).

11 This trend of increased openness in criminal proceedings also encompasses a
12 qualified First Amendment right to inspect and copy public records and documents, including
13 judicial documents and records. *Oregonian Publ’g. Co. v. U.S. Dist. Court*, 920 F.2d 1462,
14 1466 (9th Cir. 1990) (recognizing First Amendment right of access to plea agreements).
15 “[C]ourts of this country recognize a general right to inspect and copy public records and
16 documents, including judicial records and documents.” *Nixon v. Warner Communications*,
17 435 U.S. 589, 597 (1978). The right derives from common law, and creates “a strong
18 presumption” in favor of general public access to records. *Phoenix Newspapers v. U.S. Dist.*
19 *Court*, 156 F.3d 940, 946 (9th Cir. 1998). Regardless of its origin, however, the right of
20 access is not absolute; it is a qualified right. Public access can be denied if there are
21 compelling countervailing reasons for keeping records sealed. *Press-Enterprise I*, 464 U.S.
22 at 510.

23 Whether the public has a First Amendment right to inspect search warrants at any
24 particular stage in the criminal process turns on considerations of “historical experience” and
25 “logic.” *Press-Enterprise II*, 478 U.S. at 8. Under the experience factor, courts ask whether
26 there has been a tradition or history of access to the particular proceeding or record. *Id.*
27 Under the logic factor, courts consider whether public access would benefit the proceedings,
28 *id.*, in other words “whether public access . . . would serve as a curb on prosecutorial or

1 judicial misconduct or would further the public's interest in understanding the criminal justice
2 system.” *Phoenix Newspapers*, 156 F.3d at 948-49. Even without historical tradition or
3 experience, the Ninth Circuit has held that logic alone may be enough to establish a qualified
4 right of access to court documents. *In Re Copley Press*, 518 F.3d 1022, 1026 (9th Cir. 2008)
5 (citing *Seattle Times*, 845 F.2d at 1516-17).

6 At the initial hearing on the motion to unseal the warrant materials, the Court was
7 bound by *Times Mirror*, which after analyzing the *Press-Enterprise II* factors held that
8 members of the public have neither a common law nor a First Amendment right to obtain
9 warrant materials while a criminal investigation is ongoing and before indictments have been
10 returned. The circumstances have changed since the initial hearing, however. As the
11 Government acknowledges, the active investigation has now concluded and a final
12 indictment has issued. There is no real danger at this point that disclosure of the warrant
13 materials will jeopardize the investigation or hamper the ability of the grand jury to determine
14 the appropriate charges — two critical concerns that lead the *Times Mirror* court to deny pre-
15 indictment access to search warrants.

16 While the Government and the Defendant continue to invoke *Times Mirror* as a bar
17 to releasing the search warrant materials, the Court finds that the changed circumstances
18 have rendered that case inapposite. See *United States v. Kott*, 380 F.Supp.2d 1122, 1124-
19 25 (C.D. Cal. 2004) (justification for maintaining search warrant materials under seal falls
20 away once pre-indictment investigation is completed and indictment has issued); cf. *Phoenix*
21 *Newspapers*, 156 F.2d at 947 (holding that “transcripts of public proceedings must be
22 released when factors militating in favor of closure no longer exist”). Because *Times Mirror*
23 was predicated on the need for secrecy during an investigation and before a final indictment
24 is returned, that decision no longer guides the outcome here.

25 Even with *Times Mirror* out of the way, the Court must analyze whether experience
26 and logic favor recognizing a qualified First Amendment right of access to search warrants
27 at *this* stage of the criminal process, *i.e.*, post-investigation and post-indictment, but pretrial.
28 On the “historical experience” issue, the case law on access to search warrants at this stage

1 is thin. While the process of obtaining a warrant has historically been closed to the public,
2 search warrants are routinely open to the public after they are served. *Times Mirror*, 873
3 F.2d at 1215. Most of the general case law involves the pre-indictment stage, which doesn't
4 resolve whether there is a history of openness after the investigation is complete and a final
5 indictment has issued. Though the federal case law on this point is also sparse, both the
6 Defendant and the media Interveners have identified individual cases that support their
7 respective positions.

8 The Defendant relies on *United States v. Inzunza*, 303 F.Supp.2d 1041 (S.D. Cal.
9 2004), which found there was no historical tradition of public access to search warrant
10 affidavits even after an indictment is returned. In *Inzunza*, a newspaper sought access to
11 search warrant affidavits after the defendants had been indicted, but before a motion to
12 suppress had been filed. The court stated it could find "no authority permitting access to
13 sealed search warrant affidavits . . . prior to a suppression or evidentiary related motion," *id.*
14 at 1046, and accordingly concluded "historical experience cautions against a finding of public
15 access at this point in time." *Id.* at 1047.

16 *Inzunza* was decided in 2004, and despite the court's statement that it "could find no
17 authority" for public access to warrant materials at the post-indictment stage, there is plenty.
18 To start with, in the aftermath of Watergate, numerous states enacted "sunshine laws"
19 codifying the requirement that documents maintained by public entities must be available for
20 public inspection. Many state statutes applied the requirement to search warrant materials,
21 specifying that warrants must be open to the public either after they are served or after
22 criminal charges are filed. See, e.g., Alaska R. Crim. P. 37(e)(2) (search warrant "shall be
23 open to public" after charges filed); Ariz. Rev. Stat. Ann. § 13-3918 (search warrant "shall
24 be open to the public" after execution); Cal. Penal Code § 1534 (search warrants "shall be
25 open to the public" ten days after execution); Del. Ct. R., Admin. Directive No 2000-5 (April
26 3, 2000) (search warrant shall be open after return); N.H. R. Stat. § 595-A:4 (executed
27 search warrant open after return); N.C. Gen. Stat. § 132-1.4(k) (search warrants open after
28 return); S.D. Codified Laws § 23A-35-4.1 (2010) (search warrant open after investigation

1 terminated or indictment issues); Tex. Code Crim. Pro. Ann. Art. 18.011 (West 2007) (search
2 warrant open no later than 60 days after filing); Va. Code Ann. § 19.2-54 (2010) (search
3 warrant open subject to temporary sealing); see *also* U.S. Dist. Ct. R., E.D. Ark., Order 22
4 (search warrant open 7 working days after return). In addition, at least one state court has
5 found a right of public access to search warrants under its state constitution. *Associated*
6 *Press v. Montana*, 820 P.2d 421, 423 (Mont. 1991) (right of public to inspect affidavits in
7 support of warrants guaranteed by Article II, section 9 of Montana constitution). And, while
8 most of the federal cases focus on access issues during the investigatory or pre-indictment
9 phase, one federal court of appeals has held a qualified First Amendment right to inspect
10 search warrants is triggered once the warrant is executed. See *In Re Search Warrant for*
11 *Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988).¹

12 The media Interveners point to a case decided in 2008, *In re Application of New York*
13 *Times Co. for Access to Certain Sealed Court Records*, 585 F.Supp. 2d 83 (D.D.C. 2008).
14 There, the New York Times sought access to search warrants relating to the 2001 anthrax
15 attacks in and around Washington, D.C. after an investigation into those crimes had
16 concluded and the sole suspect had committed suicide. *Id.* at 86-87. The court found “there
17 is an historic common law right of access to judicial records and documents that has been
18 recognized in the United States for well over a century.” *Id.* at 89 (citing *Nixon*, 435 U.S. at
19 597, n.7, n.8). The common law right of access, the court said, supported a finding of a
20 history of openness under the “experience” prong of the First Amendment test. *Id.*

21 The situation here is different from that in *Application of New York Times*. While both
22 cases involve post-indictment media efforts to unseal warrants, in that case there was no
23 pending criminal action, and really no occasion for the court to evaluate the historical
24 experience factor in the context of the post-indictment, pretrial stage.

25
26 ¹ Two other federal appellate courts have held that search warrants should be open
27 to the public once the warrant is executed and the need for secrecy is over. See *In re*
28 *Application and Affidavit for a Search Warrant*, 923 F.2d 324, 331 (4th Cir. 1991) (affirming
order unsealing search warrant at post-indictment, pretrial stage); *Application of Newsday,*
Inc., 895 F.2d 74, 79 (2nd Cir. 1990) (refusing to extend *Times Mirror*, and finding common
law right of access to search warrant once plea agreement reached and government admits
need for secrecy is over).

1 These authorities establish that there is as much historical basis for disclosure of
2 search warrants at this stage as there is for non-disclosure, with the more recent authority
3 recognizing a right of access once the investigation has concluded and the indictment has
4 issued. Given the critical importance of the public's right to be fully informed in high profile
5 case like this one, as well as the need for robust protection of a press, this Court opts
6 to be guided by the more recent authority. The Court is persuaded by the clear trend among
7 the states during the past 30 years that experience supports finding a qualified First
8 Amendment right of access to search warrant materials once the investigation has
9 concluded and a final indictment has issued.

10 Logic also supports openness and disclosure at this stage. When there is no danger
11 of corrupting the investigation or interfering with grand jury proceedings, opening search
12 warrant materials to public inspection can play a significant positive role in the functioning
13 of the criminal justice system. Search warrants are a ubiquitous part of the criminal
14 investigatory process, and ordinary citizens are well aware of their prevalent use. The raw
15 power implicated by the authority to conduct a search is enormous. Armed with a search
16 warrant, an officer possesses the imprimatur of the law to forcibly enter homes, roust the
17 occupants, and rummage through drawers and other private places. Even though search
18 warrants are judicially authorized and the scope of the search is defined, as a practical
19 matter, most citizens know the search can be as intense and intrusive as the officer chooses
20 to make it.

21 A person whose home or property is searched pursuant to a search warrant has an
22 obvious interest in knowing that proper procedures have been followed. The general public
23 shares that interest. Public scrutiny of the search warrant process — even after the fact —
24 can shed light on how and why a warrant was obtained, and thereby further the public's
25 interest in understanding the justice system. *Phoenix Newspapers*, 156 F.3d at 949. Public
26 access to search warrants may also serve to deter unreasonable warrant practices, either
27 by the police or the courts. *Id.*; *Application of New York Times*, 585 F.Supp.2d at 90 ("Public

28 / / /

1 access to warrant materials serves as a check on the judiciary because the public can
2 ensure that judges are not merely serving as a rubber stamp for the police.”).

3 In this case, the media Interveners point out that public inspection of the search
4 warrants “will enable the public to evaluate for itself whether the government’s searches went
5 too far — or did not go far enough.” (Interveners’ Renewed Motion to Unseal Search Warrant
6 Records, at 5.) More broadly speaking, society has a valid and understandable interest in
7 the law enforcement system and how well it works. Permitting inspection of the search
8 warrants, the accompanying affidavits, and the property inventory will further public
9 understanding of the response of government officials to the Tucson shootings, and allow
10 the public to judge whether law enforcement functioned properly and effectively under the
11 hectic circumstances of that day. See *Press-Enterprise I*, 464 U.S. at 508 (opening the
12 judicial process and allowing public access to court documents “gives assurances that
13 established procedures are being followed and that deviations will become known” and
14 corrected).

15 The Defendant argues that a public interest in these matters should not be recognized
16 until such time as he challenges the legality of the warrants or the methods used during the
17 searches. This was the holding in *Inzunza*, which concluded that the “logic” factor had to be
18 tethered to and evaluated in the context of a discrete stage of the proceedings, such as a
19 suppression hearing. 303 F.Supp. 2d at 1048-49. But this seems too narrow.² What if no

21 ² *Inzunza* based its conclusion on the statement in *Press-Enterprise II* that the gist
22 of the logic test is “whether public access plays a significant role in the functioning of the
23 particular process in question.” *Inzunza*, 303 F.Supp. 2d at 1048 (citing *Press-Enterprise II*,
24 478 U.S. at 8 (italics supplied)). It is noteworthy, though, that *Press-Enterprise II* referred
25 to “process” and not to “proceeding.” While public access to search warrants may be
26 especially important in a proceeding to suppress evidence, public interest in the process of
27 how and why a warrant was obtained — e.g., what the police knew, what they told the judge,
28 what they were searching for, what they seized, etc. — may be great regardless, as this
case proves. See *In re Application and Affidavit for a Search Warrant*, 923 F.2d at 331 (“The
public has legitimate concerns about methods and techniques of police investigation: for
example, whether they are outmoded or effective, and whether they are unnecessarily brutal
or instead cognizant of suspects’ rights.”). Moreover, the historical justifications for open
hearings and for the right to inspect court documents strongly suggest that the phrase “the
particular process in question” should be broadly construed to encompass the post-
investigation, post-indictment stage of the criminal process, not just a particular hearing in
a particular case.

1 motion to suppress is filed? Or, what if the defendant pleads guilty before the motion is
2 heard and decided? Either of these common, everyday occurrences would mean the “logic”
3 factor could never be satisfied, and the important public benefits of openness would never
4 be realized.

5 Irrespective of whether disclosure is associated with a discrete criminal proceeding
6 such as a suppression hearing, post-investigation, post-indictment public access to search
7 warrants fulfills important societal objectives and benefits the criminal *process*. To reiterate
8 the point made by *Richmond Newspapers*, the benefits include: providing awareness that
9 society, through its law enforcement function, has responded appropriately to a matter of
10 great public concern; avoiding public suspicion of the criminal justice system; and
11 demonstrating the appearance of justice. All of these considerations are implicated in this
12 case, and underscore the logic of granting public access to the search warrant materials at
13 this point.

14 Accordingly, applying the test of *Press-Enterprise II*, the Court finds that there is a
15 qualified First Amendment right of access to the warrant materials in this case at this stage.

16 With a qualified First Amendment right of access established, the burden to justify
17 non-disclosure shifts to the Government and the Defendant. They must show that
18 non-disclosure “is strictly and inescapably necessary” in order to protect the Defendant’s fair
19 trial guarantee or some other compelling interest. *Brooklier*, 685 F.2d at 1167 (quoting
20 *Gannett*, 443 U.S. at 441). This is a high bar, surmountable only by establishing a substantial
21 probability that: (1) disclosure will cause irreparable harm to the Defendant’s fair trial rights
22 or some other compelling interest; (2) there is no alternative to continued secrecy that will
23 adequately protect the right or interest; and (3) non-disclosure will effectively protect against
24 the perceived harm. *Oregonian Publ’g. Co.*, 920 F.2d at 1466. *See also United States v.*
25 *Kaczynski*, 154 F.3d 930, 932 (9th Cir. 1998) (overcoming qualified right of access under the
26 First Amendment requires compelling showing beyond that necessary to overcome common
27 law right of access) (Reinhardt, J., concurring).

28 ///

1 Factors 1 and 3 tend to merge in this case. As pointed out during the initial hearing
2 on the motion to unseal, much of the information in the warrant materials has already been
3 reported by the media and is known to the public. Among the details that have been widely
4 reported are: the Defendant's home was searched; a computer and two hard drives were
5 seized from the Defendant's room; an envelope containing the words "Giffords" and "I
6 planned ahead" and "my assassination" was found in a safe in the Defendant's home, as
7 was a letter addressed to the Defendant on Congresswoman Giffords's congressional
8 stationery; and, agents interviewed the Defendant's parents after breaking down a door to
9 gain entry into their house. *See, e.g., FBI Agents Visit Jared Loughner's Family Home*, CBS
10 NEWS.COM (January 10, 2011), [http://www.cbsnews.com/stories/2011/01/10/national/](http://www.cbsnews.com/stories/2011/01/10/national/main7232017.shtml)
11 [main7232017.shtml](http://www.cbsnews.com/stories/2011/01/10/national/main7232017.shtml); Rebecca Kelly, *Envelope found in shooter's house shows*
12 *premeditation (Listen to 911 Call)*, EXAMINER.COM (January 9, 2011, 7:17 PM),
13 [http://www.examiner.com/people-the-news-in-national/envelope-found-shooters-house-s](http://www.examiner.com/people-the-news-in-national/envelope-found-shooters-house-shows-premeditation-listen-to-911-call)
14 [hows-premeditation-listen-to-911-call](http://www.examiner.com/people-the-news-in-national/envelope-found-shooters-house-shows-premeditation-listen-to-911-call); Billy House, *Jared Loughner Formally Charged by*
15 *Federal Prosecutors*, NATIONAL JOURNAL (January 11, 2011, 5:54 PM), [http://nationaljournal.](http://nationaljournal.com/congress/jared-loughner-formally-charged-by-federal-prosecutors-20110109)
16 [com/congress/jared-loughner-formally-charged-by-federal-prosecutors-20110109](http://nationaljournal.com/congress/jared-loughner-formally-charged-by-federal-prosecutors-20110109); David
17 Nakamura, *Videos show details of Tucson shooting*, THE WASHINGTON POST (January 19,
18 2011 12:00 AM) [http://www.washingtonpost.com/wp-dyn/content/article/2011/01/18/](http://www.washingtonpost.com/wp-dyn/content/article/2011/01/18/AR2011011801155.html)
19 [AR2011011801155.html](http://www.washingtonpost.com/wp-dyn/content/article/2011/01/18/AR2011011801155.html).

20 The Defendant and the Government fear that disclosure of the warrant materials at
21 this point will make it more difficult to empanel an impartial jury. They are also concerned
22 that releasing the information will violate the privacy interests of people whose names are
23 mentioned in the affidavits, and may damage their reputations. Although both concerns are
24 legitimate and the Court has carefully weighed them, neither creates a substantial probability
25 that irreparable harm will result from the release of the warrant materials.

26 First, neither party has made a convincing case that preventing the possible
27 republication of information that has already become a matter of public knowledge is "strictly
28 and inescapably necessary" to protect a compelling interest. *See Virginia Dep't of State*

1 *Police v. Washington Post*, 386 F.3d 567, 579 (4th Cir. 2004) (interest in protecting integrity
2 of ongoing murder investigation was insufficiently compelling to overcome qualified First
3 Amendment right of access when bulk of information under seal was already public
4 knowledge); *In re Charlotte Observer*, 921 F.2d 47, 50 (4th Cir. 1990) (vacating injunction
5 prohibiting disclosure because “[o]nce announced to the world, the information lost its secret
6 characteristic”). Second, privacy and reputational concerns typically don’t provide sufficient
7 reason to overcome a qualified First Amendment right of access. *In re Application of New*
8 *York Times Co.*, 585 F.Supp. 2d at 93 n.14 (citing *In re McClatchy Newspapers, Inc.*, 288
9 F.3d 369, 374 (9th Cir. 2002) (“injury to official reputation is an insufficient reason for
10 repressing speech that would otherwise be free”) (citation and internal quotations omitted)).
11 That is particularly true here, where the only third parties mentioned in the warrant materials
12 are law enforcement agents and citizen witnesses who are not, and have never been,
13 suspects in the case.³ With the bulk of the information already in the public domain, and no
14 legitimate risk to privacy or reputation at stake, unsealing the warrants now is unlikely to
15 cause irreparable harm to anyone.

16 The Court has also considered whether there are alternatives that will adequately
17 protect the rights and interests of the parties, and has determined there are several. To
18 begin with, the trial of this case is not expected to begin for months. Experience teaches that
19 the passage of time tends to dim memories and dampen community reaction to a shocking
20 event. That will likely occur here. Next, with the assistance of counsel, the Court intends to
21 develop a comprehensive jury questionnaire, which will help identify the extent of exposure
22 prospective jurors may have had to news coverage about this case and assist counsel in
23 ferreting out people with fixed opinions. Also, although not usual in federal court, the Court
24 will permit counsel to personally and extensively voir dire prospective jurors. This, too, will

25
26 ³ The situation here is very different from one in which the warrant affidavit implicates
27 an uncharged third party in crime or other wrongdoing, thereby potentially damaging his
28 reputation and violating his privacy. *Compare Times Mirror*, 873 F.2d at 1216-17 (persons
named in warrant papers have no forum to exonerate themselves if warrant materials are
made public before indictment or no charges are filed). In this case, neither the citizen
witnesses nor the officers are likely to suffer reputational harm if their names become known.

1 help ensure that an impartial jury is selected, and help protect the parties' right to a fair trial.
2 The Court will also consider granting additional peremptory challenges to each side, if voir
3 dire establishes that is necessary.

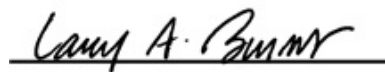
4 As a final precaution, in addition to the intended measures outlined above, the Court
5 has redacted a minimum of information from the property inventory and one of the affidavits.
6 The Tucson shootings have generated a media frenzy — an almost unceasing stream of
7 news coverage about the circumstances, the victims, the accused, and the reactions of
8 public officials to the tragedy. Widespread interest in this event, as well public reaction to
9 it, is understandable. Ultimately, however, the criminal accusations against the Defendant
10 must be judged not on news accounts or according to general public sentiment, but on
11 competent, tested evidence in a courtroom. It is this Court's responsibility to ensure that.
12 Accordingly, guided by the First Amendment standards outlined above, the Court has
13 determined that there is a compelling need to maintain under seal limited portions of the
14 property inventory and one of the affidavits that are likely to be inflammatory and difficult to
15 forget, or inadmissible at trial. The redacted information will be unsealed as soon as it
16 becomes appropriate.

17 CONCLUSION AND ORDER

18 The media outlets have a qualified First Amendment right to inspect the search
19 warrant materials in this case, and that right is not outweighed by privacy or fair trial
20 concerns. The motion to unseal the search warrants is **GRANTED**. The Clerk of the Court
21 shall immediately make available for inspection and copying by the media Interveners
22 and the general public the redacted version of the search warrant materials that has been
23 approved by the Court.

24 **IT IS SO ORDERED.**

25 DATED this 9th day of March, 2011.

26 

27 **HONORABLE LARRY ALAN BURNS**
28 United States District Judge